NO. 83-783

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HILARY DAVIS,

Petitioner,

vs.

WILLIAM E. GLADSTONE, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WILLIAM E. GLADSTONE, ADELE SEGALL FASKE, RALPH B. FERGUSON, JR., SEYMOUR GELBER, and SIDNEY SHAPIRO, Juvenile Judges of the Dade County, Florida Circuit Court,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the judgment and opinion of the United States

Court of Appeals for the Fifth Circuit, sitting en banc, entered in this proceeding September 15, 1983, reported at 714 F.2d 512.

SUMMARY OF ARGUMENT

Petitioner requests this Court to grant a right to appointed counsel in dependency proceedings to indigent parents who are accused of abuse, neglect or abandonment that could lead to the permanent termination of their right to the custody of their children. Respondents submit that the relief the Petitioner requests is already being provided in Florida courts to all indigent parents in permanent termination hearings and to all such parents who might be subject to criminal child abuse charges or the permanent termination of their rights in a dependency proceeding.

A.

THE LAW OF FLORIDA ALREADY PROVIDES A RIGHT TO COUNSEL TO MOST INDIGENT PARENTS IN A DEPENDENCY ADJUDICATORY PROCEEDING WHERE THE STATE SEEKS TO TAKE CUSTODY OF A CHILD FOR A TEMPORARY OR INDEFINITE PERIOD OF TIME.

In Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981), the Court held that the due process clause of the Fourteenth Amendment requires counsel to be appointed only on a case-by-case determination at a parental rights termination hearing. Petitioner requests that this Court extend a right to counsel to all indigent parents in accusatory dependency adjudicatory proceedings. As this Court noted in Lassiter, the termination of parental rights begins in a dependency hearing where the parent has been accused of abusing, neglecting or abandoning his or her

child. Contrary to Petitioner's assertions, under Florida law, those indigent parents who run the risk of permanently losing custody of their children already have a right to appointed counsel, both at the dependency adjudicatory proceeding and the parental rights termination hearing.

Since the decision of the United States District Court in this case, the Florida Supreme Court has decided the very issue presented here. In In the Interest of D.B., 385 So.2d 83 (Fla. 1980), the Supreme Court of Florida ordered the courts of Florida to provide appointed counsel to indigent parents in all juvenile dependency proceedings where there may be a termination of parental rights or criminal

child abuse charges might result.[1] D.B. at 90-91. Only where there is no threat of permanent termination of parental custody or criminal child abuse charges will the right to counsel be decided on a case-by-case basis. D.B. at 95. The court

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[1]A child may be found to be dependent if he has been abandoned, abused or neglected by his parents or other custodian. §39.01(9)(a), Fla. Stat. (1981). A parent's right of custody may be terminated if the parent is found to have abandoned, abused or neglected the child. §39.41(1)(f)1 a, Fla. Stat. Abandoned, abuse and neglect are defined in §39.01(1), (2) and (26), Fla. Stat., respectively. Any parent who commits conduct that can be classified as abandonment, abuse or neglect can be charged with the crimes of child abuse, neglect or contributing to the dependency of a child. §§827.03, 827.04, 827.05 and 827.06, Fla. Stat. When a petition for dependency is filed alleging abandonment, abuse or neglect, the parent's conduct toward the child may lead to criminal child abuse charges An adjudication of dependency will not preclude a later prosecution of the parent. §827.04(3), Fla. Stat. Under present Florida law the mere allegation of abuse, neglect or abandonment will require the appointment of counsel to the indigent parent.

addressed the issue in an appeal of orders from the Eleventh Judicial Circuit Court of Florida, based upon the District Court's decision in this case, directing the State to pay for attorney's fees for indigent parents and children in all juvenile dependency proceedings.

The Florida Supreme Court began with a historical background examination of the right to counsel. Utilizing the general principal, enunciated by this Court, that right to counsel in a legal proceeding is dependent upon the nature of the proceeding, D.B. at 89, that court analyzed the many well-known decisions of this Court mandating when counsel is required. It was beyond question, that court found, that appointed counsel was required whenever an accused could be deprived of his physical liberty. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335

(1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); and In Re Gault, 387 U.S. 1 (1967). But counsel is not absolutely required in other criminal or civil proceedings. In a civil proceeding, such as a dependency proceeding, the right to counsel is governed by due process considerations, such protections varying with the nature of the proceeding involved. D.B. at 89 citing Morrissey v. Brewer, 408 U.S. 471 (1972).

Recognizing that "there is a constitutionally protected interest in preserving the family unit and raising one's children" D.B. at 90, citing this Court's decisions in Moore v. East Cleveland, 431 U.S. 494 (1976); Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345 U.S. 528 (1953); and Meyer v. Nebraska, 262 U.S. 390 (1923), the Florida Supreme Court recognized "that a right to counsel may be required in certain

circumstances" of dependency proceedings. D.B. at 90. Reviewing their prior opinion in Potvin v. Keller, 313 So.2d 713 (Fla. 1975), that court reaffirmed the test announced in Potvin, which expressly adopted the right-to-counsel test created by the Ninth Circuit Court of Appeals in Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974). D.B. at 87 and 90.

The factual situation in Cleaver was not unlike this case. Certain indigent parents in California filed a civil rights action seeking to have counsel appointed to represent them in child dependency proceedings. The Ninth Circuit, after considering due process requirements, rejected the parents request for an absolute right to counsel substituting a test to be applied on a case by case basis

to determine if counsel is required.[2] Faced with the question for the first time in Potvin, the Florida Supreme Court accepted the Cleaver test since those factors assured constitutional requirements were met and it provided a sensible set of guidelines for a court to follow to determine the fairness of a custody proceeding. 313 So.2d at 706.

In In the Interest of D.B., supra, the protection for indigent parents in child dependency hearings was broadened. For the first time in Florida, indigent parents

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[2]The factors to be considered are: (1) the potential length of parent-child separation; the longer the potential separation may be, the more counsel is necessary; (2) the degree of state restrictions on parental control once a child has been declared a ward of the court; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; and (5) the parents ability to cope with the complexity of the proceedings in terms of witnesses and documents. 499 F.2d at 945.

were guaranteed appointed counsel in "proceedings involving the permanent termination of parental rights to a child" or "when the proceeding because of their nature, may lead to criminal child abuse charges". 385 So.2d at 90.[3] Only where there is no threat of permanent termination of parental custody is the Cleaver test to be applied. Even where there is no constitutional right to counsel under the Cleaver test, the court encouraged the trial courts to use their historic authority to provide legal assistance. D.B. at 91.

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[3]The court concluded that "where permanent termination or child abuse charges might result, counsel must be appointed for (1) the natural married or divorced indigent parents of the child, (2) the natural indigent mother of an illegitimate child, and (3) natural indigent father of an illegitimate child when he legally has recognized or is in fact maintaining the child." D.B. at 91. (emphasis added).

The Florida Supreme Court chose the "middle road" by requiring appointed counsel "when parents are threatened with permanent loss of custody or when criminal charges may arise from the proceeding, and by applying the Cleaver test on a case-by-case basis in all other circumstances." D.B. at 95.

The holding of the Florida Supreme Court goes far beyond the constitutional requirements subsequently announced by this Court in Lassiter. Unlike Lassiter, Florida requires appointment of counsel to indigent parents in parental rights termination proceedings. Furthermore, addressing an area not considered by Lassiter, Florida requires appointment of counsel for indigent parents in dependency proceedings where there is a threat of a permanent loss of custody or when criminal child abuse charges may arise from the proceeding.

The lesson of Potvin and the directive of In Re D.B., have not been ignored by the lower courts of Florida. Petitioner states on page 15 of his Petition that the rights that have existed in Florida since 1975 "[have] not worked, and cannot work". Additionally in footnote 19 it is stated "not a single decision of a Florida appellate court has reversed an adjudication of dependency resulting in a temporary commitment to DHRS for failure to appoint counsel". These statements are incorrect. The Florida appellate courts have reversed trial court orders where no counsel was appointed to the indigent parents who were threatened with the permanent loss of their child or faced possible criminal child abuse charges.

In In the Interest of A.Z., 383 So.2d 394 (Fla. 5th D.C.A. 1980) (decided before D.B., supra,), a petition had been filed

alleging that A.Z. was a truant and the mother could not control her. The mother and daughter appeared at the final dependency hearing but were not represented by counsel. Without advising them of their right to counsel, the trial cout held a hearing, heard testimony and received various documents. The mother was not given the opportunity to question any other witness. As a result of the information gathered, the trial court adjudicated A.Z. dependent. The District Court of Appeal, noting that §39.406, Fla. Stat. required the trial court to advise the child and parent of their right to counsel, found that the trial court failed to advise the mother and child of their rights to counsel, did not inquire whether they wished to be represented nor did he offer to appoint the counsel if they could not afford to hire one. This failure to hold

the dependency adjudication as required by statute was a denial of due process and required the District Court of Appeal to vacate the adjudication of dependency. See also, In Re R.W.H., 375 So.2d 321 (Fla. 3rd D.C.A. 1979) (reversal of permanent commitment order because of failure to advise the parent of her right to counsel), following Potvin.

Since In Re D.B., the Fifth District Court of Appeal set aside an adjudication of dependency where the parent was not represented by counsel and remanded the case for a new hearing. See, In Re R.W., 429 So.2d 711 (Fla. 5th D.C.A. 1983). In that case, the State filed a petition for dependency alleging that the children were dependent, having been abandoned, abused or neglected by their parents. At a conference with the appointed guardian ad litem and state attorney, the parents,

without counsel, signed a stipulation agreeing not to contest the allegations of the petition and accepted an adjudication of dependency. When the father violated the stipulation, the State moved to take custody. In the meantime, the mother retained counsel. Later at the custody hearing, the trial court found the stipulation had been violated and transferred custody to the State. The mother appealed the trial court's orders because she was not appointed counsel prior to the execution of the stipulation. The District Court of Appeal, in quashing the stipulation of dependency and the transfer of custody order, held that the trial court was in error when it said that it could not appoint counsel to the indigent mother. It was the duty of the trial court to appoint counsel, not merely inform the parent of her rights, when the appropriate

circumstances existed, citing Lassiter, In Re D.B. and Potvin. Id. at 712.

In a case where permanent termination of parental custody or the possibility of criminal child abuse charges were not present, the district court of appeal nevertheless reversed the trial court and remanded the case because the parent was not advised of her right to counsel. In the Interest of A.T.P., 427 So.2d 355 (Fla. 5th D.C.A. 1983) the District Court of Appeal was faced with the situation at an adjudicatory hearing where the parent, who would not face the permanent loss of her child or face possible criminal child abuse charges, was not informed of her rights to counsel, as is required by §39.406, Fla. Stat. While it is unsure whether the mother would have been entitled to appointed counsel, the trial court had the duty to at least advise the parent of her

right to counsel and to see if she could afford one, following the tests of Potvin and In Re D.B. Again, because of the failure to advise the parent of her right to counsel, the trial court's orders were reversed.

Today, indigent parents in Florida who are threatened with the permanent loss of custody of their children or who face possible criminal child abuse charges in any dependency proceeding have the right, pursuant to In Re D.B., to appointed legal counsel.

B.

A COMPARISON OF FLORIDA'S PRESENT LAW ON RIGHT TO COUNSEL FOR INDIGENT PARENTS IN DEPENDENCY PROCEEDINGS WITH THE STANDARDS SET OUT IN LASSITER REVEALS THAT FLORIDA'S PROTECTIONS GO BEYOND MINIMUM CONSTITUTIONAL REQUIREMENTS.

The United States Court of Appeals, reported at 714 F.2d 512 (5th Cir. 1983) (en banc), citing Lassiter, held that due process requires only a case-by-case analysis of the right to counsel for indigent parents in Florida dependency proceedings. Id. at 518. The Petitioner asserts that a dependency hearing, at issue here, is different than the termination hearing at issue in Lassiter, thereby agreeing with the dissenting members of the Court of Appeals that, had Lassiter been applied properly, that Court would have upheld their earlier en banc decision declaring a right to appointed counsel for

indigent parents in dependency adjudicatory proceedings. In light of the Florida Supreme Court's opinion in In the Interest of D.B., supra, a comparison of the present Florida law with the test of Lassiter will reveal that the protections sought by the Petitioner are provided to her.

The Court of Appeals was correct when they stated that Mrs. Davis' physical liberty was not at stake. Therefore, the presumption, created by this Court, that an indigent litigant has a right to counsel only when, if he loses, he may be deprived of his physical liberty does not apply in this case. Id. at 515. In Lassiter the presumption was against the appointment of counsel. The Lassiter presumption is applicable here.

In deciding Lassiter, this Court reviewed the three elements propounded in Mathews v. Eldridge, 424 U.S. 319 (1976).

The first element from Mathews was the private interests at stake. In Lassiter, the private interest at stake were obvious, the parent's interest in preserving the family unit along with the care, custody and companionship of her children. This Court has long recognized the preservation of the family unit is constitutionally protected. Stanley v. Illinois, supra, and May v. Anderson, supra. Those two cases were also cited for the same purpose in In Re D.B., 385 So.2d at 90. This private parental interest is also present here.

Like the proceeding under consideration in Lassiter, a Florida permanent termination hearing[4] can result in a

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[4]In Florida, the State has bifurcated its dependency proceedings into a fact-finding adjudicatory hearing, where the State first must prove that the subject child is dependent, §39.408(1), Fla. Stat., and a deposition hearing where the trial court determines the placement of the dependent (cont'd on next page)

complete and irrevocable ending of the parent's right to his or her child. While this court determined in Lassiter that due process only requires a case-by-case analysis of whether counsel must be appointed in a termination hearing, Florida already requires that an indigent parent be appointed counsel at any termination hearing. In Re D.B., 385 So.2d at 90-91 and 95.

However, unlike a termination proceeding, a Florida dependency proceeding will usually result in only temporary custody of the child.[5] Chapter 39 is in

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child. §§39.408(2) and 39.409, Fla. Stat. Only if a child is found dependent may a child be placed by the court, §39.409, Fla. Stat. and then his power of disposition is limited by §39.41, Fla. Stat. Permanent termination of parental rights is only one of a number of alternatives available to the trial court under §39.41(1) Fla. Stat., at a disposition hearing.

[5]If a child is found to be dependent, the (cont'd on next page)

existent to protect the children of Florida, In Re D.B., supra and while the best interests of a child override any parental right to custody, Potvin v. Keller, 313 So.2d at 705, citing In Re Interest of Camm, 294 So.2d 318 (Fla. 1974), the State is not unmindful of the rights of parents in dependency proceedings, Noeling v. State, 87 So.2d 593 (Fla. 1956); In Re Smith, 299 So.2d 127 (Fla. 3rd D.C.A. 1974). Permanent termination may result after an adjudication of dependency but termination of parental rights is not to be taken

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court may (1) place the child in his own home, in the home of a relative or some other suitable place, all under protective supervision; (2) place the child in the legal custody of an adult relative; (3) commit the child to a licensed child-caring agency; (4) commit the child to the temporary legal custody of DHRS; or (5) permanently commit the child to DHRS or a licensed child-placing agency. §39.41(1), Fla. Stat.

lightly nor done without good cause. In Re Adoption of Braithwaite, 409 So.2d 1178 (Fla. 5th D.C.A. 1982); Carlson v. State, Department of Health and Rehabilitative Services, 378 So.2d 868 (Fla. 2nd D.C.A. 1979); In Re Smith, supra.

To protect the rights of the parents, even before termination approaches reality, the Florida Supreme Court has decreed that all indigent parents have a right to appointed counsel at the adjudicatory hearing of the dependency proceedings if permanent termination or criminal child abuse charges might result. D.B. at 90-91, 95. Where there is no such threat, then the trial court is to use the Cleaver test, on a case-by-case basis, to determine if counsel is to be appointed.

The second prong of the Mathews test is the government's interest. The interest of Florida is, and has historically been, to

protect the children of this state from abuse or neglect, hopefully trying to correct and stabilize the family unit, but if not, to do what is necessary to prevent further harm to the child. See §39.001, Fla. Stat.; In the Interest of D.B., supra; In Re Interest of Camm. supra; and Noeling v. State, supra. In protecting the welfare of its children, the State wants to protect the parent's interests. One way to protect that interest is to provide counsel to indigent parents. Florida feels it has protected that interest where it's courts are required to provide counsel to indigent parents in all permanent termination hearings and in adjudicatory dependency proceedings where permanent termination or criminal child abuse charges may result. Also, the Court must, as required by Lassiter, determine on a case-by-case basis in other cases if the indigent parents have

a right to appointed counsel. By providing counsel to those indigent parents, the State's interests and the parent's interests are met.

The final prong of the Mathews test is the risk that the procedures used will lead to erroneous decisions. As the Court of Appeals found in its en banc decision below,[6] Florida's dependency proceedings

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[6]The Florida dependency statute has various provisions designed to ensure a correct decision: a petition can be filed only by the state attorney, an authorized agent of the division of youth services or of the division of family services, or a 'person who has knowledge of the facts alleged or is informed of them and believes that they are true,'. §39.404(1) Fla Stat., the petition must be in writing and must be signed by the petitioner under oath stating his good faith in filing the petition, §39.404(2), id.; a written answer to the petition need not be filed by any party, including the parent, but any matters may be pleaded orally before the court, §39.406, id.; once a petition has been filed, the court may order the child to undergo a physical or psychological examination with the parent or child's consent, §39.407, id.; an adjudicatory (cont'd on next page)

were designed to ensure a fair and correct decision. These procedures, both statutory and the Florida Rules of Juvenile Procedure, along with the mandated right to counsel to indigent parents as discussed above, clearly provide enough protection against the risk of erroneous decisions. With such counsel present, the rights and interests of the parents are protected.

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hearing is held as soon after a petition is filed as is practicable, §39.408(1)(a), id.; the hearings are conducted by a judge without a jury; the rules of evidence in civil cases are applied §39.408(1)(b) id.; the state represented by counsel, must prove its case by a preponderance of the evidence, §39.404(3) and §39.408(1)(b) id.; once a child has been adjudicated a dependent, the court must hold a disposition hearing , at which time it considers a predisposition study presented by an agent of the division of youth or of family services, §39.408(2), id.; finally, the child or parent may appeal the dependency adjudication. §39.413(1), id. 714 F.2d at 516-17 (citations to Florida Statutes are corrected to reflect the revision in the law since the beginning of the action.)

When the Court of Appeals compared this case with Lassiter using the Mathews prongs, that court found there was no "material distinction". 715 F.2d at 517. In applying the Lassiter opinion to this case "Lassiter requires a case-by-case analysis of the right to counsel for indigent parents in Florida dependency proceedings" Id. at 518. However, it can not be too strongly repeated that since 1980, Florida has gone far beyond this constitutional minimum. This state now possesses a higher requirement, one this Court hoped the states would one day adopt. 452 U.S. at 33-34.

CONCLUSION

Florida law requires that all indigent parents involved in permanent termination proceedings or involved in adjudicatory dependency proceedings where criminal child abuse charges or parental termination might result, have a right to appointed counsel. All other indigent parents not so effected will have their right to counsel determined by the Cleaver test on a case-by-case basis.

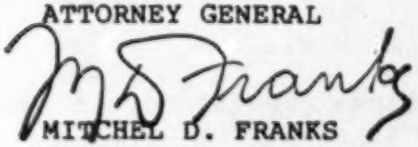
These provisions, in place today, provide the Petitioner with the due process protections requested here. The provisions mandate counsel where it is not required by this Court and go far beyond the due process requirements of Lassiter. In reality, Respondents do not believe that Petitioner has any claim of deprivation remaining. This case is moot, the relief sought by the petitioner is already

required in Florida. It is not a case of mootness with the escape of review while being capable of repetition. If the same case were to arise today, the Florida court would be required to provide appointed counsel to Petitioner.

Based upon the above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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